***United States Court of Appeals***

***for the Second Circuit***

# PETITION FOR REHEARING EN BANC

75-1421

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee.

v.

No. 75-1421

JACK NATHAN,

Appellant.

PETITION FOR REHEARING
AND SUGGESTION FOR
REHEARING EN BANC

NATHAN LEWIN
Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400

Attorney for Appellant

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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| UNITED STATES OF AMERICA, Appellee, v. JACK NATHAN, Appellant. | No. 75-1421 |

PETITION FOR REHEARING
AND SUGGESTION FOR
REHEARING EN BANC

Appellant hereby petitions, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, for rehearing of the attached decision in this case, issued on June 16, 1976, and as grounds therefor states as follows:

1. With regard to two critical trial errors, the decision of June 16 misapprehended the trial record and misapplied binding decisions in this Circuit:

(a) The refusal to give an instruction on a defense theory supported by proof. The law is clear beyond any doubt that a defendant is absolutely entitled to have included, in the final charge to the jury, an instruction on any theory of defense as to which there has been any proof whatever during the trial. United States v. Platt, 435 F.2d 789 (2d Cir. 1970);

United States v. O'Connor, 237 F.2d 466, 474 n.8 (2d Cir. 1956). The use made by Mr. Nathan of the funds he received when he cashed checks at the Waldorf-Astoria, New York Hilton and St. Moritz was a vigorously disputed factual issue. Yet the trial judge rejected two defense requests directed specifically to this factual question.

This Court rejected this argument on the ground that (p. 4205):

> The only evidence regarding cash gratuities introduced at trial was from Joseph Mazzurco, the credit manager at the Waldorf Astoria, who admitted receiving between $200 and $500 in cash per year from appellant.

This conclusion is wrong in several respects:

First, Mazzurco's testimony was not that he had received "between $200 and $500 in cash per year"; in fact, he kept insisting that he could not estimate how much he had received in all (A. 229-231). What he did say was that he received a payment whenever Mr. Nathan came to the hotel to present a statement and pay the amounts collected (A. 227-228). An examination of the check stubs shows that this occurred on an average of once a month, and each payment was, according to Mazzurco's account, $40 to $100, with a payment which "might have hit $150" around the holidays (A. 228). The proper total estimate for Mazzurco's annual payment alone would come, therefore, to between $500 and $1250.

Second, Mazzurco did not only testify about himself. This Court has overlooked his even more important testimony that what was done for him was also done throughout the industry. Mazzurco was asked (A. 235):

> Was it a policy, if you know, in your business as the credit manager when you dealt with these people that they gave you gratuities from time to time?
>
> A Could you repeat that, sir?
>
> Q Yes, sure.
>
> THE COURT: I think not policy, was it a practice?
>
> Q I will accept your Honor's modification. Was it a practice or a custom?
>
> A Yes.
>
> * * * * *
>
> Q This practice as far as you know, at least with respect to Mr. Nathan, existed from 1967 to 1970 at the Waldorf with you as a credit manager?
>
> A Yes.
>
> Q And to the extent that you have indicated that you have received amounts from him from time to time?
>
> A That's right, yes.

Third, the other credit managers--particularly Groppe--provided testimony that supported the inference that there were cash payments to credit managers. Groppe admitted having received personal payments by check from Mr. Nathan's firm, but tried to

provide some innocent explanation for those payments (A. 186-197, 199).[1/] He also admitted receiving money from Mr. Nathan as a gift, although he asserted that this was "at Christmastime" (A. 186).[2/] Even Carey--who was not directly questioned on the subject--admitted that he had been "entertained" with his family on one occasion (A. 221), and that he saw Mr. Nathan "entertaining others" in hotels where he was employed (A. 221-222).

Fourth, the total cash involved --$36,000 in four years--was far less than what the Internal Revenue Service would have accepted as a reasonable travel and entertainment allowance for such a business in a single year (A. 349). In fact, the 1967-1969 travel and entertainment expenses shown on Mr. Nathan's books added up to a total of less than $4,000--or approximately $1,300 per year (Gov't. Ex. No. 6). On this record, the jury could fairly conclude that the cash received by the hotels was being used for business expenses--gratuities to the credit managers as well as other forms of entertainment.

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1/ The tape recording discussed infra related to this particularly important question of credibility.

2/ This Court should surely not blind itself to the possibility that a credit manager regularly receiving cash gratuities for sending business to a particular firm might be reluctant to admit such receipt openly--particularly if amounts were not fully reflected on tax returns.

By comparing the dollar amount testified to by Mazzurco with the total value of the cashed checks over the four-year period, this Court totally misread the defendant's theory of defense. Mazzurco's testimony, corroborated by the reluctant admissions of Groppe and Carey and by the accountant's testimony regarding the amount ordinarily spent by such a business on travel and entertainment, was a substantial basis for the defense forcefully made by defendant's trial counsel in summation (Transcript, pp. 662-665) that the money was not used by Mr. Nathan for personal, taxable purposes.[3/] There was, we submit, far more proof in this record of the defense the judge refused to mention in his final charge than there was in United States v. Platt, 435 F.2d 789 (2d Cir. 1970), which this Court does not even cite or discuss although that conviction was reversed on precisely this ground.

(b) The exclusion of the tape recording. This Court has erroneously concluded that the tape recording of Groppe's conversation with Mr. Nathan was only "temporarily excluded . . . pending proper identification of the scope and

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3/ In this regard, the supplementary instruction to the jury (A. 625-626) aggravated the trial court's error by assuming, as fact, this disputed question. Defense counsel objected on this ground (A. 626), and his objection was rejected by the trial judge.

contents of the tape" (p. 4206). This Court is confusing the prosecution's position with that of Judge Bonsal. The following colloquy makes it clear that Judge Bonsal excluded the tape and was not prepared to permit it in evidence even if the "scope and contents" were identified. (A. 563-564):[4/]

> MR. WOHL: Your Honor, there is one matter that I would like to bring to your attention other than on the charge and that is- actually there are two matters. First of all we have come to the conclusion that if the defense were able to get their offer in of that tape in proper order in the sense that they could give us the beginning of the conversation or they could tell us that that's--
>
> THE COURT: I am not going to worry very much about that tape. I don't know whether it proves very much anyway. I can see why the government would sort of like to get it in, it originally was offered by the defense, because the defendant was sort of overbearing as I heard, but I don't think it makes really enough differences what--Groppe, he was up at the St. Moritz and I don't quite see what relevance that has. The issue still is the checks for cash and the checks that were not presented.
>
> MR. WOHL: I just wanted to make one thing clear, and that is that there is no problem on the availability of Mr. Groppe

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4/ We are somewhat mystified by this apparent requirement. How does one identify "scope and contents"? If--as is not really contested--the tape contained Groppe's voice speaking to Mr. Nathan and it contradicted what Groppe testified to under oath, why could it not be played in the presence of Groppe and the jury for its impeachment value? As noted previously, this conversation had none of the self-serving statements that made a similar tape unusable for presentation before a jury in United States v. McKeever, 271 F.2d 669, 675-676 (2d Cir. 1959).

> if they wanted to put him on. We asked him to come back, I believe he is in the witness room today. If the defense wanted to cross-examine him concerning that they could. I think it is a tactical decision.
>
> THE COURT: All right, you made the offer and I appreciate that. . . .

Even the "temporary exclusion" of the tape was, we believe, erroneous because there was no real disputed issue before the trial court when the tape was first presented. The only quarrel was with the fact that the beginning of the conversation was not recorded.[5/] That omission did not make the tape unusable for the intended purpose, as we demonstrated conclusively in our main brief (pp. 57-58).

This Court's conclusion that the judge was only seeking "to avoid delays in the trial by requiring counsel who does not have his evidentiary material in workable order to proceed with examination of a witness rather than to bog down the trial by a

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5/ The long quotation that appears as footnote 4 of this Court's opinion actually omits five full pages of transcript (pp. A. 204-208, Transcript pp. 130-134), substituting for the omission the words: "[Two portions of the tape were then played.]" In fact, these five pages indicate that the sole objection made by the prosecution and sustained by the judge was that the "beginning" of the conversation was not recorded (A. 208):

> I am ruling if you insist on it, if we get the beginning of the conversation you can put it in and on the redirect he can bring out all kinds of things if he wants to, but okay.

lengthy, awkward in-court attempt to straighten matters out, here selecting portions of a tape for playback" (p. 4206) is, we submit respectfully, based on a total misreading of the record. No "selection of portions of a tape for playback" was involved; it was clear, by the time Judge Bonsal ruled, that only the end of the conversation was recorded (see p. 54, footnote 21 of our original brief). There would have been no delay whatever in permitting that portion to be played in Groppe's presence before the jury.

Second, conclusive proof that delay was not the judge's concern arises from the fact that he called a recess immediately after issuing his ruling (A. 210).

The fact is that Judge Bonsal stated several reasons for excluding the tape, none of which withstands analysis. At first, he relied erroneously on the fact that there was no "beginning" to the conversation. On the following day, he said that the tape would be admissible only in the defendant's case and only after a full foundation had been laid (A. 335):

> . . . if you are going to bring that tape in in the defendant's case I want a proper foundation. I want the jury to know how it happened this was taped, I think they are entitled to know that, who did it and so forth. I think I would want that if it is going to come in.

This position--as well as the concluding assertion that the tape was irrelevant (A. 563)--was plainly wrong. It not only conflicts with Judge Friendly's opinion for another panel of this Court in United States v. Barash, 365 F.2d 395, 400-401 (2d Cir. 1966)--thereby justifying en banc consideration--but it also conflicts with a recent decision of the Third Circuit in United States v. Segal, Nos. 75-1534, 75-1539, decided February 6, 1976, attached hereto as Appendix II. After all the varied efforts to explain and justify what Judge Bonsal did, the fact remains that a critical piece of evidence on an important point--whether Groppe lied in denying he had received gratuities from Mr. Nathan--was kept from the fact-finder in this close case.

2. This Court also erred in summarizing the proof said to be in the record on the issue of willfulness. The summary of the proof (pp. 4204-4205) recites the trial testimony in a form that omits entirely the overwhelmingly exculpatory testimony of the accountant who actually completed the tax returns in the years for which Mr. Nathan was charged. For those years--1967 to 1970--Sanford Katz did Mr. Nathan's accounting work, and, as the testimony quoted in full at pages 18-20 and pages 25-29 of our main brief establishes, Katz took total responsibility for the errors that resulted in lower tax payments. This Court's recitation of the facts erroneously makes it appear as if Katz--who testified

as a prosecution witness--had incriminated Mr. Nathan.[6/] In fact, in his sworn testimony Katz assumed full blame for what happened, and if Katz were believed, Mr. Nathan would have had to have been acquitted. Much of the prosecutor's summation was taken up with an attack on Katz' credibility.

Since this Court erroneously stated the facts, it omitted entirely any consideration of the square conflict between the conviction of Mr. Nathan on this proof and the Third Circuit's decision in United States v. Pechenik, 236 F.2d 844 (3d Cir. 1956), discussed in our main brief at pp. 36-40. As we indicated, every critical factor in Pechenik was also present in this record. The prosecution has failed to come up with a single tenable distinction, and this Court has--rather than meeting the issue--chosen to ignore it.

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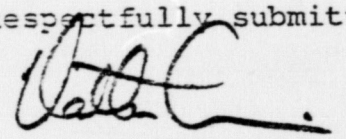
6/ For example, this Court's opinion says: "A second accountant, Sanford Katz, hired to succeed Edwards, also testified that appellant was aware of the mounting sum of stale 'refund' checks carried on the agency's books." Katz' testimony (our main brief, pp. 14-15) was that he had a single brief conversation sometime in 1966 with Mr. Nathan on the subject during which Mr. Nathan had explained that the bank had been told to honor old checks--a policy carried out with the actual negotiation of such drafts. And the Court says with respect to the "refund" checks: "Both Edwards and Katz had been led to believe that these checks were 'refund' or 'client' checks . . ." There is not a word of testimony to support the conclusion that Mr. Nathan "led" them "to believe"any such thing. Edwards did not testify at all about the "refund" check practice, and Katz testified that the sole reason he classified them as "refund" checks was that he never checked the stub book with the actual checks themselves, which showed clearly on the reverse side that they were not "refund" checks. See testimony at A. 352-354, quoted at pp. 26-28 of our main brief.

For the foregoing reasons, rehearing should be granted and the judgment of conviction reversed.

Respectfully submitted,



NATHAN LEWIN
Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400
Attorney for Appellant

Dated: June 29, 1976

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June 1976 two copies of the Petition for Rehearing and Suggestion for Rehearing En Banc were served by first-class mail, postage prepaid to: Frank Wohl, Assistant United States Attorney, Southern District of New York, 1 St. Andrews Plaza, New York, New York 10007.

NATHAN LEWIN

APPENDIX I

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 964—September Term, 1975.

(Argued March 25, 1976 Decided June 16, 1976.)

Docket No. 75-1421

UNITED STATES OF AMERICA,

*Appellee,*

v.

JACK NATHAN,

*Appellant.*

Before:

LUMBARD, OAKES and TIMBERS,

*Circuit Judges.*

Appeal from a judgment of conviction under 26 U.S.C. § 7201 for evasion of income taxes, entered on December 8, 1975, in the United States District Court for the Southern District of New York, Dudley B. Bonsal, *Judge*. Appellant argues that (1) the evidence of willfulness was insufficient; (2) an erroneously excluded tape of a conversation impaired development of a critical theory of the defense; (3) introduction of large charts summarizing portions of the prosecution's evidence without appropriate cautionary instructions was prejudicial error; and (4) participation in the interrogation of witnesses by the trial judge indicated to the jury that the judge held a bias in favor of conviction in this case.

Affirmed.

4201

NATHAN LEWIN, MILLER, CASSIDY, LARROCA & LEWIN, Washington, D.C. (Jamie Gorelick, Miller, Cassidy, Larroca & Lewin, Washington, D.C., on the brief), *for Appellant.*

FRANK H. WOHL, Assistant United States Attorney (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, Alan Levine, Lawrence B. Pedowitz, John C. Sabetta, Assistant United States Attorneys, of counsel), *for Appellee.*

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OAKES, *Circuit Judge:*

This appeal is from a judgment of conviction entered in the United States District Court for the Southern District of New York, before Dudley B. Bonsal, *Judge*. After a six-day trial, the appellant, Jack Nathan, was found guilty on four counts of evasion of personal income taxes, 26 U.S.C. § 7201,[1] and sentenced to concurrent terms of nine months' imprisonment and a fine of $10,000 on each count.

The tax evasion scheme proved at trial was simple and direct in its conception. The appellant owned and operated a bill collection agency, Nathan, Nathan & Nathan, Ltd., in New York City. The agency business was collection of delinquent customer accounts owed to hotels and other clients. The collection receipts obtained by the agency were deposited in full in the firm's own bank ac-

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1 26 U.S.C. § 7201 provides that:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

count. A fee of approximately 35 per cent was retained by appellant's agency, and the balance was remitted to the client by a check carried on the firm's books as a "refund." The Government proved at trial that the firm, at appellant's direction, employed two devices to understate its income[2]: (1) "refund" checks written to clients were carried on the books as expenses, even though in many cases the checks had not been cashed three or more years after they were allegedly mailed to the clients; (2) checks made out to client hotels which were not "refunds," but for which the appellant had received cash from the hotels, were treated as "refund" checks on the agency's books and charged as expenses. By the end of 1970, approximately $50,000 of income had been concealed in stale "refund" checks, and during the period of 1967 through 1970, approximately $36,000 of cash was siphoned out of the agency through Nathan's cashing of putative "refund" checks at the client hotels.

Appellant raises the following claims at this appeal: (1) the evidence that appellant "willfully" evaded payment of his income taxes, *see* note 1 *supra*, was insufficient to warrant submission of the case to the jury; (2) the defense was prejudiced by an erroneous exclusion of a taped conversation tending to show that the proceeds of checks cashed by appellant at client hotels were used to pay "gratuities" to the credit managers at those hotels; (3) use by the Government of charts which summarized portions of the evidence, without appropriate cautionary instructions, was prejudicial error; and (4) participation

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2 Since the collection agency was organized as a Subchapter S corporation during the period covered in the indictment, the profits of the firm constituted income to the appellant. 26 U.S.C. § 1373. Therefore, his willful participation in a scheme to understate the agency's profits constitutes evasion of his personal income taxes under 26 U.S.C. § 7201, *see* note 1 *supra*.

in the interrogation of witnesses by the trial judge indicated to the jury that the judge was biased in favor of conviction. We reject each of these arguments and affirm the judgment of the trial court.

There is ample evidence of appellant's willful evasion of taxes to support the conviction. An accountant formerly employed by appellant, Allan Edwards, testified that he had informed Nathan that the stale "refund" checks should be written off the agency's books and that as an accountant he could not prepare the appellant's tax returns unless the appropriate adjustment were made. Nathan then fired Edwards, allegedly for cause,[3] though the jury could well have believed Edwards was fired because of appellant's desire to conceal his income. A second accountant, Sanford Katz, hired to succeed Edwards, also testified that appellant was aware of the mounting sum of stale "refund" checks carried on the agency's books. From this evidence the jury could well conclude that appellant willfully engaged in conduct which concealed his income. Nathan did not testify and the defense presented no witnesses.

The evidence of willful evasion of taxes with regard to appellant's cashing of "refund" checks at client hotels is equally forceful. These amounted to 160 checks aggregating $86,120 during the tax years in question, 1967-70. The stubs for and the face of these checks looked just like genuine "refund" checks (although the reverse side of the checks carried a different endorsement). Both Edwards and Katz had been led to believe that these checks were "refund" or "client" checks, and appellant never gave contrary instructions, told his accountants that he was

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3 Appellant claims that Edwards was fired because he had failed to prepare Nathan's income tax returns on time and had assigned junior employees to work on the account rather than doing the returns himself.

obtaining cash for the checks at the client hotels, or made any other entries on the stubs or face of the checks which he generally drew himself. This circumstantial evidence of willful evasion of taxes was sufficient to allow the case to go to the jury. The appellant has argued that the Government failed to show that Nathan did not use the cash proceeds of these checks for business purposes (*i.e.*, "gratuities" and entertainment for client credit managers). While "the ultimate burden of persuasion remains with the Government" on the issue whether *net* taxable income was understated by the taxpayer, *United States* v. *Leonard*, 524 F.2d 1076, 1083 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3621 (U.S. May 4, 1976), we agree with Judge Coffin that "[t]he applicable rule here is that uniformly applied in tax evasion cases—that evidence of unexplained receipts shifts to the taxpayers the burden of coming forward with evidence as to the amount of offsetting expenses, if any." *Sirayo* v. *United States*, 377 F.2d 469, 473 (1st Cir. 1967).

In this case, moreover, as in *United States* v. *Leonard*, *supra*, the defense that the check proceeds were used to pay legitimate business expenses was not sufficiently raised in the evidence to require the trial court to instruct the jury on this possible defense. The only evidence regarding cash gratuities introduced at trial was from Joseph Mazzurco, the credit manager at the Waldorf Astoria, who admitted receiving between $200 and $500 in cash per year from appellant. No nexus between these payments and the proceeds of the challenged checks appears in the record; even if it did appear, the sums involved fall far short of explaining any material portion of the approximate $9,000 cash per year appellant was obtaining out of agency earnings through the cashing of the bogus "refund" checks. All of the checks were cashed at three

New York hotels. Even assuming that each of the credit managers at these hotels were receiving cash "gratuities" of $200 to $500 per year from appellant, this accounts for no more than one-sixth of the cash proceeds obtained by Nathan for the checks. There is not the slightest hint in the record as to a legitimate business usage for the remaining bulk of the cash proceeds of these checks. In these circumstances, it was proper for the trial court to refuse to instruct the jury that if the check proceeds had been wholly paid [illegible] business purposes there was no evasion of income [illegible] *United States* v. *Leonard, supra; United States* v. *Gross*, 286 F.2d 59, 61 (2d Cir.), *cert. denied*, 366 U.S. 935 (1961).

Appellant claims that a taped conversation between appellant and Leonard Groppe, the credit manager at the St. Moritz Hotel, indicating receipt of gratuities by the latter, was improperly excluded. However, the tape was only temporarily excluded during appellant's cross-examination of Groppe pending proper identification of the scope and contents of the tape. It is quite plainly within the trial court's discretion to avoid delays in the trial by requiring counsel who does not have his evidentiary material in workable order to proceed with examination of a witness rather than to bog down the trial by a lengthy, awkward in-court attempt to straighten matters out, here selecting portions of a tape for playback.[4] The defense

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4 When the defense offered the tape in evidence it was unable to identify the portion of the tape it intended to play back. The following colloquy took place at the side bar:

The Court: What's the date of the tape?

Mr. Bender: I have to check it. I have to check it. I have to find out.

The Court: Find out.

(Pause.)

Mr. Bender: 5/21/64.

The Court: And who initiated the call?

was invited to offer the tape again whenever it had ascertained what portions of what conversations on the tape it sought to have admitted in evidence. The defense's omission to make a subsequent offer deprives it of grounds for attacking the trial court ruling on this appeal. Any error, had there been one, was rendered harmless by the open opportunity to offer the tape once it was properly prepared for use. *See United States* v. *Badalamente*, 507 F.2d 12, 22 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975).

Appellant objects to the Government's use of two large, "outsized" charts to summarize the evidence concerning

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4 (Continued)

Mr. Bender: I think he said that he called.

The Court: But I don't know if that's the one that you have the tape on.

Mr. Bender: I think he said he did.

The Court: You must know who initiated the call.

Mr. Bender: I wish I did. I can find out.

(Pause.)

Mr. Bender: Mr. Nathan says that the witness called him.

[Two portions of the tape were then played.]

The Court: That's what I am looking for. Where is the beginning?

The Defendant: Excuse me, your Honor, I believe at the end of this we will go open [sic] to the other. I believe so. I haven't played these things—

The Court: You think this is a different conversation?

The Defendant: Yes, sir.

[Tape played.]

The Court: I am trying to get the beginning of the one that you had before. You don't know?

The Defendant: No, I don't know.

The Court: Gentlemen, what I think I am going to do with this thing, I am not going to put this on now. I will let you cross-examine him about the content and if during the defendant's case you get this straightened out, you find out what conversations are what and who originated them and you will want to put them on in the defense case, that will be all right, and if it is necessary to recall the witness we can do that, but I think on the present state I am not going to permit this to be presented to the jury now.

the number and amount of the various checks improperly charged against the agency's income. Admission of charts for the purpose of summarizing facts contained in other exhibits was entirely proper. *United States* v. *Silverman*, 449 F.2d 1341, 1346 (2d Cir. 1971), *cert. denied*, 405 U.S. 918 (1972).[5] Appellant complains, however, that the trial court failed to instruct the jury that the charts were not themselves evidence and should not be considered as such. At the time the first of the two charts was introduced, however, Judge Bonsal instructed the jury that it was

> merely a chart . . . which contains the information as to these various checks, Exhibits 31 to 145. The checks themselves are in evidence, the chart is merely to help you as a pictorial representation.

This instruction conveyed to the jury the substance of the cautionary instruction required by *Holland* v. *United States*, 348 U.S. 121, 128 (1954), and *United States* v. *Goldberg*, 401 F.2d 644, 647-48 (2d Cir. 1968), *cert. denied*, 393 U.S. 1099 (1969). It is true that while the judge indicated that in his final charge he would again caution the jury as to the limited function of the charts, he inadvertently neglected to do so.[6] But viewing the entire trial as a whole, it is apparent that this inadvertence did not prejudice appellant, a conclusion fortified by the lack of a specific contemporaneous objection at the close of the

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5 Appellant claims that the charts used by the Government were prejudicially large. Their size, three feet by seven and one-half feet, was no greater than necessary to convey the information (dates, amounts, exhibit numbers, etc.) on the 115 checks referred to in GX 33d or the 138 stubs referred to in GX 33S, and the type size of less than one inch is plainly proper in the light of the requirement that the jury be able to read it. We take it that juries are not so unsophisticated as to be likely to be misled by the size of a courtroom chart, in any event.

6 Both sides had requested the charge and Judge Bonsal had indicated that a charge to that effect would be made.

court's charge. *See* Fed. R. Crim. P. 30; *United States* v. *Bermudez*, 526 F.2d 89, 97 (2d Cir. 1975).

The final argument raised is that Judge Bonsal's participation in the examination of several witnesses betrayed a prejudice favoring conviction which deprived appellant of a fair trial. Appellant has indicated 17 instances where the trial court intervened in the defense's examination of witnesses to ask clarifying questions. The Government has also cited several places in the record where Judge Bonsal raised objections on behalf of the defense, and interrupted or curtailed the Government's examination of witnesses. We are satisfied upon examination of the entire record that Judge Bonsal conducted the trial fairly and impartially.

Judgment affirmed.

Appendix II

Date Filed 4-7-76

Date Received 4-15

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1534
No. 75-1539

UNITED STATES OF AMERICA,
*Appellee*

*v.*

MORRIS SEGAL and GEORGE HENRY HURST, JR.
George Henry Hurst, Jr., *Appellant in 75-1534*
Morris Segal, *Appellant in 75-1539*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Criminal No. 75-85)

Argued February 6, 1976

Before: SEITZ, *Chief Judge*, VAN DUSEN and WEIS, *Circuit Judges*.

Stephen A. Sheller, Esquire
Pechner, Dorfman, Wolffe, Moss & Rounick
1845 Walnut Street
Philadelphia, Pennsylvania
*Attorneys for Appellant, George Henry Hurst, Jr.*

Marvin Comisky, Esquire
Thomas A. Bergstrom, Esquire
Blank, Rome, Klaus & Comisky
1100 Four Penn Center
Philadelphia, Pennsylvania
*Attorneys for Appellant, Morris Segal.*

Robert E. J. Curran, Esquire
United States Attorney

J. Clayton Undercofler, III, Esq.
First Assistant U.S. Attorney

Walter S. Batty, Jr., Esquire
Assistant U.S. Attorney
Chief, Appellate Section
3310 United States Courthouse
Philadelphia, Pennsylvania
*Attorneys for Appellee*

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## OPINION OF THE COURT

(Filed April 7, 1976)

WEIS, *Circuit Judge.*

Defendants were tried jointly and convicted of conspiracy and bribery of a public official in violation of 18 U.S.C. §§ 371 and 201(b)(2), arising out of the payment of money to an Internal Revenue agent to falsify a tax liability. We reverse the convictions and remand for a new trial because the voir dire examination of the jury panel and the cross-examination of the prosecution's witnesses were improperly restricted.

Defendant Segal was a certified public accountant who represented the defendant Hurst during an audit of his tax returns by Internal Revenue Agent Edward Sigmond. During the period from June to December, 1974, Sigmond contacted Segal on a number of occasions. At their first meeting, Segal intimated that he might offer Sigmond a bribe, a matter which the agent reported to the Inspection Service. Thereafter, on visits to Segal's office, Sigmond wore a body recorder. He also recorded a number of telephone conversations with Segal and one with Hurst.

At the trial, Sigmond was the principal government witness. He testified that Segal offered to obtain $20,000.00

from Hurst, of which $15,000.00 would go to the agent in return for submitting a false audit report, and the remaining $5,000.00 would be retained by the C.P.A. In December of 1974, Sigmond received $5,000.00 from Hurst through Segal, with a promise that the remainder would follow. On January 7, 1975, Sigmond telephoned Hurst and recorded the conversation in which Hurst admitted providing the bribe and promised to pay the amount still due. Hurst was arrested the following day and gave a statement to Internal Revenue officials admitting his participation and also implicating Segal.

On appeal, both defendants claim that the voir dire of prospective jurors was unduly limited and that the cross-examination of Sigmond was improperly restricted. Hurst also contends that because a redacted version of his confession presented an erroneous view of his part in the affair, a severance was required.

I.

Counsel for the defense submitted proposed voir dire questions designed to supplement the court's inquiries. Segal's attorney filed suggested questions before the date set for jury selection and Hurst's counsel tendered others after the court had concluded the standard interrogation. The judge began the voir dire by asking each venireman to state his occupation for the preceding five years and that of his spouse or other employed person in the household. Thereafter, general questions were propounded to the panel, including the following:

> "Is or has any member of your immediate family ever been an official or employee of the United States Government?"

Seven members of the panel raised their hands indicating an affirmative answer to this question. The next query was:

"Are you or have you ever been an official or employee of the United States Government?"

Seven persons indicated an affirmative answer to this question. Twelve of the 31 veniremen answered at least one of these two questions affirmatively.

After addressing further general questions to the panel, the court refused to ask the more specific questions submitted by defendant Segal. Two of these would have inquired whether any member of the panel or his immediate family was employed by the Internal Revenue Service or similar departments of the city or state. Hurst's counsel asked that the prospective jurors, who had indicated employment by the federal government, be asked what specific activities they had in their last employment. That request was also declined.

In federal cases, it is approved procedure for the trial judge to question the veniremen on voir dire. This practice expedites the selection of an impartial jury and prevents the excessively lengthy voir dire proceedings which occur in some jurisdictions. The Bench Book, published under the auspices of The Federal Judicial Center, contains a list of suggested questions and apparently was the source of most of the queries utilized by the judge in this case. While these questions are adequate in most instances, situations do arise where supplemental inquiries should be made.

The trial judge has wide discretion to determine the scope and content of the voir dire. *See United States v. Napolcone*, 349 F.2d 350 (3d Cir. 1965); FED. R. CRIM. P. 24(a). But the parties have the right to some surface information about prospective jurors which might furnish the basis for an intelligent exercise of peremptory challenges or motions to strike for cause based on a lack of impartiality. *Ristaino v. Ross*, 44 U.S.L.W. 4305, 4308 n.9 (U.S. March 3, 1976); *Kiernan v. Van Schaik*, 347 F.2d 775 (3d Cir. 1965). *See also United States v. Robinson*, 485 F.2d 1157 (3d Cir. 1973); *United States v. Poole*, 450

14 CrL 2088

18 CrL 3082

F.2d 1082 (3d Cir. 1971). *Cf. United States v. Wooton*, 518 F.2d 943 (3d Cir. 1975).

Because of the circumstances in this case, the defendants would reasonably need to know whether any member of the panel or any person in his family had ever been employed by the Internal Revenue Service. The possibility of lingering loyalty to the service, friendship of persons still employed there, or knowledge of agency procedures are all factors which counsel would weigh in deciding whether to challenge. Since it was known that a number of veniremen had been employed by the government, the requests by defense counsel were reasonable and should have been honored. As the Court said in *United States v. Wood*, 299 U.S. 123, 134 (1936):

> "In dealing with an employee of the Government, the court would properly be solicitous to discover whether, in view of the nature or circumstances of his employment, or of the relation of the particular governmental activity to the matters involved in the prosecution, or otherwise, he had actual bias, and, if he had, to disqualify him."

Similarly, past employment by the specific agency prosecuting the case is a matter which should be explored upon a party's request. The refusal to do so requires that a new trial be granted.

## II.

Since upon a retrial it is likely that the scope of cross-examination will again become an issue, we shall discuss it at this time.

Agent Sigmond testified about the several conferences and telephone conversations he had with Segal from May to December, 1974. Excerpts from some of the recordings were played for the jurors who were supplied with transcripts of these conversations for use while listening to the

tapes. Since some of the recordings, particularly those of all-day conferences, were quite lengthy, some editing was necessary. Obviously, much of the material was inconsequential, and playing all of it would have unduly prolonged the trial and aided no one.

In an effort to keep the trial moving, the judge ruled that on cross-examination defense counsel would not be permitted to replay tapes which had been heard during direct examination. He directed that cross-examination be conducted by use of the transcripts. Defense counsel assert that they wished to replay portions of the tape rather than relying on the transcripts because voice inflections were important.

If in any specific instance this contention should appear to be valid, the court should consider the advisability of allowing replay. In general, however, we cannot find error in the court's suggestion that the transcript be used in reviewing material which had once been played.[1] The court's policy offered a practical way to eliminate the delays which necessarily accompany the playing of selected excerpts from lengthy and unindexed tapes.

However, the court also prohibited defense counsel from using transcripts or playing parts of a recording which had not been heard during direct examination. This restriction was based on the premise that cross-examination should not exceed the scope of direct and that the defendants were free to present the proffered evidence in their own case. We think this limitation unduly narrowed the scope of cross-examination and hindered proper presentation of the defense case.

Federal Rule of Evidence 611(b) provides that cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of

1. Defendant Hurst was denied the opportunity to replay a recording of a telephone conversation of January 7, 1975. Apparently, the purpose was to show that the beginning of the call had not been recorded. However, on cross-examination that fact was admitted by the agent and we do not think the trial judge erred in refusing to play the recording a second time.

the witness. While the trial court has wide discretion to prevent repetition, harrassment of the witness or production of irrelevant material, the right of cross-examination is of constitutional dimension and may not be denied. *Davis v. Alaska*, 415 U.S. 308 (1974). Therefore, if a matter has been raised on direct examination, generally cross-examination must be permitted. Moreover, questioning of the witness which tests his perception, memory, or otherwise tends to discredit him is proper. *Davis v. Alaska, supra.*

One of defendants' complaints is directed at an incident which occurred during the cross-examination of Agent Sigmond. He had testified about statements made during a conference with Segal on September 16, 1974. Although Sigmond used a body recorder on that date and a transcript had been prepared, the tape was not played to the jury during the direct examination. On cross-examination, defense counsel's attempts to use either selected portions of the tape or the transcript for that day were blocked by the court. Counsel for Segal explains in his brief:

> "... the meeting of September 16, 1974 and the tape recorded conversations arising therefrom became crucial to the defense in their endeavor to show that, in fact, at no time during this meeting did the defendant attempt to or offer to Agent Sigmond a bribe in the form of money or gratuities and that rather, certain conversations recorded on that day indicated that Agent Sigmond was himself attempting to solicit a bribe from the defendant."

Since the court did permit some inquiry about that meeting and restricted counsel only on the use of the recording, it seems that the difficulty centered on the question of what constituted the scope of direct examination. In our view, the scope is to be measured by the subject matter of the direct examination rather than by specific exhibits which

are introduced at that time. *See* Federal Rule of Evidence 611(b).

Moreover, the fact that some of the points which defendant sought to explore could have been introduced in the defense case is not determinative. That specific evidence could have been a part of the defense does not preclude its development on cross-examination if the prosecution makes the subject matter part of its direct testimony. *United States v. Lewis*, 447 F.2d 134 (2d Cir. 1971).

The ruling of the trial court in this instance was erroneous because it unduly limited cross-examination.[2]

## III.

After his arrest, Hurst gave a statement to Internal Revenue officials in which he said that Segal had contacted him about the tax deficiency and had indicated $10,000.00 in cash was needed to pay somebody for reduction of the tax. Thereafter, Mrs. Hurst took $5,000.00 in small bills to Philadelphia where she gave them to Segal's business partner. Hurst's statement was redacted by deleting Segal's name in an effort to avoid the problem presented by *Bruton v. United States*, 391 U.S. 123 (1968).

On cross-examination of the I.R.S. official to whom the statement had been given, Hurst's counsel sought to establish entrapment by bringing out the references to Segal. The court sustained Segal's objection to the questions on this point and denied Hurst's motion for severance.

The grant of severance is a matter within the discretion of a trial court and involves the balancing of a number of considerations. Foremost of these is prejudice to the defendant. That, however, should be real, not fanciful. It must be considered together with the desirability of joint trials, particularly those involving a legitimate

2. We recognize that the playing of excerpts from tapes can lead to delays during the trial. However, a delay may be obviated through counsel's use of cassettes or tapes prepared in advance which contain only the relevant portions of the conversations and are adequately indexed.

conspiracy count such as was present here. The circumstances of each case will control the decision.

The references which Hurst's lawyer sought to elicit from the witness were arguably within the scope of *Bruton*. But considering the overwhelming nature of the evidence, mention of Segal's name might have been harmless beyond a reasonable doubt. *See Harrington v. California*, 395 U.S. 250 (1969). After listening to Sigmond's tape, the jury was well aware that Segal had acknowledged contacting Hurst in December. Similarly, it is difficult to conceive the existence of any doubt that the $5,000.00 in cash had been delivered to Segal because the recorded conversation between him and Sigmond as they counted the money had been played for the jurors. Nevertheless, the trial judge's conclusion that *Bruton* required editing of Hurst's statement was certainly not incorrect.

The redaction, however, raises another issue. The case at bar is unusual in that the objection to admission of the redacted confession comes not from a co-defendant who would be implicated by hearsay evidence, but from the defendant who gave the statement. He does not assert error in inclusion as a co-defendant usually does but, rather, complains of exclusion. Hurst alleges prejudice because he could not produce evidence which would have been admissible on cross-examination but for Segal's objection based on lack of confrontation.

Essentially, then, Hurst's position is that his case should have been severed because of the restriction on his cross-examination. Again, we are dubious that any actual prejudice exists on the record of the first trial. Hurst wished to bring out his comments that Segal had a part in arranging the bribe. To believe that the jury was not fully aware of this fact, in view of the tape recordings, is to live in a never-never land. While the issue is an interesting one, we do not pass upon it because we have granted a new trial on other grounds.

The motion for severance, if made on retrial, must be decided on the record that is before the trial court at that time. We cannot anticipate what circumstances may exist then. For example, if Hurst should decide to testify on his own behalf, then the question would become moot because Segal could then have the right of cross-examination and the *raison d'être* of *Bruton* would not exist. *Nelson v. O'Neil*, 402 U.S. 622 (1971); *Government of Virgin Islands v. Ruiz*, 495 F.2d 1175 (3d Cir. 1974). Alternatively, in view of other evidence in the case, Hurst may decide not to object to the deletions, or Segal may not insist upon redaction at the second trial.

We are not called upon to consider the propriety of alternatives which would obviate the *Bruton* problem: *e.g.*, empanelling two separate juries as was done in *United States v. Sidman*, 470 F.2d 1158 (9th Cir. 1972), *cert. denied*, 409 U.S. 1127 (1973), or holding a bifurcated trial as was done in *United States v. Crane*, 499 F.2d 1385 (6th Cir.), *cert. denied*, 419 U.S. 1002 (1974). *See also United States v. Rowan*, 518 F.2d 685 (6th Cir.), *cert. denied*, 44 U.S.L.W. 3280 (U.S. Nov. 11, 1975). The propriety of these procedures can be considered if and when they are employed by the district court.

The judgment of the district court will be reversed and a new trial ordered as to both defendants.

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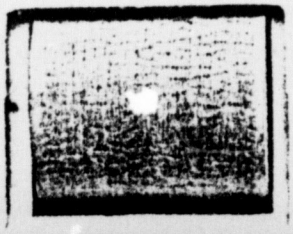

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June 1976 two copies of the Petition for Rehearing and Suggestion for Rehearing En Banc were served by first-class mail, postage prepaid to: Frank Wohl, Assistant United States Attorney, Southern District of New York, 1 St. Andrews Plaza, New York, New York 10007.

NATHAN LEWIN